RECENT CASE NOTES

ADMIRALTY—SALVAGE OF ONE GOVERNMENT VESSEL BY ANOTHER.—A government tug was chartered at the usual rate of $25.00 an hour to tow *The Olockson*, a United States Shipping Board vessel which was on fire, into shoal water and sink her. *The Olockson* had been abandoned by her master and crew. After permission was secured from the Marine Superintendent to attempt to save the vessel, the captain and crew of the tug through highly meritorious service succeeded in getting *The Olockson* into port where the cargo and vessel, worth nearly $300,000, was saved. The members of the tug's crew brought this suit in admiralty for salvage. *Held,* (one judge *dissenting*) that the plaintiff could recover an award of $15,000. *The Olockson* (1922, C. C. A. 5th) 281 Fed. 690.

A claim for salvage must contain the following elements: (1) a marine peril to the property rescued; (2) service voluntarily rendered when not required as an existing duty or by special contract; (3) success in whole or in part. *Manchester Liners Ltd. v. United States* (1918) 53 Ct. Cl. Rep. 449; 35 Cyc. 720. Since an award for salvage is given because of the desirability of compensating extraordinary and voluntary services rendered at sea in time of peril, it is immaterial that both vessels are under the same ownership. See, Act of August 1, 1912 (37 Stat. at L. 242); *Gilchrist Transp. Co. v. Northern Wheat* (1903, W. D. N. Y.) 120 Fed. 432. Nor does the fact that both are owned by the government prevent a recovery. *Jacobsen v. Panama Ry.* (1920, C. C. A. 2d) 266 Fed. 344; *Rees v. United States* (1904, N. D. Calif.) 134 Fed. 146. A more difficult problem would arise if both vessels were battleships. The test of whether or not the acts performed were in line of duty would probably be applied. See *The Ulysses* (1888, C. A.) 60 L. T. R. (N. S.) 111. The view in the dissenting opinion was that the service rendered was covered by the express contract. As the work was of such a dangerous character, however, that the tug would have been privileged to refuse to perform the contract such a view cannot be supported. For a further discussion of the law of salvage see (1921) 30 YALE LAW JOURNAL, 757.

ATTACHMENTS—CONVERSION OF SECURITIES—ACTUAL AND CONSTRUCTIVE FRAUD.—The defendant rehypothecated stocks which the plaintiff had pledged with him for a debt larger than that which they secured and upon tender was unable to return them. The plaintiff levied an attachment on the defendant's property under a statute permitting such a levy where the defendant "fraudulently contracted the debt or incurred the obligation respecting which the action is brought." Bagby's Ann. Md. Code, 1911, art. 9, sec. 36. *Held,* that the unlawful conversion was a "debt fraudulently contracted" within the meaning of the statute. *Turner & Thomas v. Schwarz* (1922, Md.) 117 Atl. 904.

By the great weight of authority a rehypothecation of securities by the pledgee to secure a larger debt than that for which they were pledged to him is a conversion. *Sproul v. Sloan* (1913) 241 Pa. 284, 88 Atl. 501. Statutes limiting attachments to claims arising on contract are generally construed to include quasi-contractual claims, so that the tort may be waived and the suit considered as arising from an "implied" contract. *State v. Superior Court* (1919) 105 Wash. 676, 178 Pac. 827. To sustain the attachment, there must be an actual intent to defraud on the part of the debtor. *Fidelity Co. v. Johnston* (1906) 117 La. 880, 42 So. 357. The term "fraud" covers a species of wrong involving moral turpitude and may be defined as any unfair means used with the express intention of deceiving another. Thus, in the action of deceit it is necessary to prove a representation known to be false and made with the specific intention that it be acted on. *Kountze v. Kennedy* (1895) 147 N. Y. 124, 41 N. E. 414; Pollock, *Torts* (11th ed. 1920) 281. A negligent misrepresentation is not sufficient.

Derry v. Peek (1889, H. L.) 14 A. C. 337. However, if made recklessly it is equivalent to the requisite *scienter*. *Miller v. John* (1904) 208 Ill. 173, 70 N. E. 27. By the weight of authority an innocent principal is liable in deceit for the misrepresentations of his agent. *Barwick v. Joint Stock Bank* (1867) L. R. 2 Exch. 259; 2 Mechem, *Agency* (2d ed. 1914) sec. 1995. This, however, is not an abandonment of the requirement of moral turpitude in the facts constituting the tort, but rather a necessary incident of the doctrine of *respondeat superior* in allocating responsibility. In equity the term "fraud" is made susceptible of wider application. A person will not be allowed to retain the fruits of a bargain induced by his innocent misrepresentation. *Helvetia Copper Co. v. Hart Parr Co.* (1917) 137 Minn. 321, 163 N. W. 665; 3 Williston, *Contracts* (1920) sec. 1500. Equity seeks to relieve from an unjust enrichment and an actual misrepresentation is the essential operative fact, so the term "equitable fraud" may perhaps be condoned. Again, although an actual intent to defraud is necessary to invalidate a will, yet if there is an unjust enrichment because of the repudiation of a parol promise on the part of the devisee or legatee, though he had no fraudulent intent at the outset, a constructive trust exists in favor of intended beneficiaries. Rood, *Wills* (1904) sec. 171; *In re Everts Estate* (1912) 163 Calif. 449, 125 Pac. 1058; Gifford, *Will or No Will?* (1920) 20 COL. L. REV. 862. A large class of cases is embraced in the loose term "constructive fraud." Where the consideration for a contract is so inadequate as to shock the conscience, or where one of the parties is mentally weak or laboring under necessity or pecuniary distress, the court is said to presume fraud in fact, and equity will set aside the transaction. Pomeroy, *Equity Jurisprudence* (4th ed. 1918) sec. 927; *Herzog v. Gipson* (1916) 170 Ky. 325, 185 S. W. 1119. But proof of good faith is a defense. *Grimminger v. Alderton* (1915) 85 N. J. Eq. 425, 96 Atl. 80. A breach of a fiduciary relation by failure to make full disclosure is said to be "constructive fraud": for example, a conveyance of trust property by a trustee to himself without knowledge or consent of the *cestui que trust* is always voidable. *Linsley v. Strang* (1910) 149 Iowa, 690, 126 N. W. 941. But, wherever applied, the term "constructive fraud" is purely a fiction and is only confusing. Smith, *Surviving Fictions* (1917) 27 YALE LAW JOURNAL, 317, 319; *cf. Nocton v. Lord Ashburton* [1914, H. L.] A. C. 932; (1915) 31 L. QUART. REV. 93. In view of the variety of meanings which courts attach to the term "fraud," just what was intended by the legislature in the instant case becomes a matter of conjecture. On grounds of policy it seems that, unless the debtor is a non-resident, the drastic remedy of attachment ought to be confined to cases of actual *mala fides*. It is in reality an added security necessary where there is a suspicion that the debtor will prevent satisfaction of the judgment by concealing his assets. Wade, *Attachments* (1887) sec. 8. In the instant case there was sufficient evidence from both the contract and the custom of the business to warrant a belief by the defendant that his act was privileged, but in the view of the court "it was not essential to the validity of the attachment that any fraud or intention to defraud at the time should have existed." This is opposed to the great weight of authority and is objectionable in its inaccurate interpretation of an important legal concept. 30 L. R. A. 465, note; Wade, *op cit.* sec. 98.

BANKRUPTCY—EXEMPT CLASSES—CLASSIFICATION GOVERNED BY OCCUPATION AT DATE OF ACT OF BANKRUPTCY.—The defendant was engaged chiefly in farming both at the time when an involuntary petition was filed and when the act of bankruptcy was committed. When the debts were incurred, however, he was a cashier of a bank as well as a farmer. *Held,* that the occupation at the time of committing the alleged act of bankruptcy was decisive, and that the defendant could not be adjudicated a bankrupt. *In re Beiseker & Martin* (1921, D. Mont.) 277 Fed. 1010.